IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL WRIT PETITION NO. 1885 OF 2006

SHEETAL MANOJ GORE)
Room No. 4, Jawad Manzil,)
K.K. Ganguli Marg, Santacruz(W))
MUMBAI 400 049) .. PETITIONER

Versus

1. THE STATE OF MAHARASHTRA)
Through the Secretary to the)
Govt. of Maharashtra, Home)
Department, Mantralaya,)
MUMBAI 400 032)

2. CHANDRA IYENGAR)
The Principal Secretary to)
the Govt. of Maharashtra,)
Home Department (Appeals and)
Security) and Detaining)
Authority, Mantralaya,)
MUMBAI 400 032.)

3. THE SECRETARY)
Advisory Board Constituted)
under COFEPOSA Act,)
Home Department (Special))
State of Maharashtra)
12th Floor, Mantralaya,)
Mumbai)

4. THE SUPERINTENDENT OF PRISON)
The Mumbai Central Prison,)
Arthur Road, Mumbai)

5. THE SUPERINTENDENT OF PRISON)
Nasik Road Central Prison,)
Nasik.) .. RESPONDENTS

Mr. S. N. Kantawala with Mr. Yogesh Rohira for petitioner
Mr. D. S. Mhaispurkar, APP

CORAM:-SMT. RANJANA DESAI &

ANOOP V. MOHTA, JJ.
DATED:-9/01/2007

ORAL JUDGMENT: (Per Smt. Ranjana Desai, J.)

. In this writ petition the petitioner who is the wife of one Manoj Arjun Gore, who has been detained under the provisions of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 ("COFEPOSA Act" for short) with a view to preventing him in future from abetting the smuggling of goods, has challenged the detention order dated 27th January, 2006 issued by the Principal Secretary to the Government of Maharashtra, Home Department (Appeals & Security) and Detaining Authority.

2. We have heard Mr. Kantawala, the learned counsel for the petitioner. Mr. Kantawala has assailed the impugned order only on one ground. He submitted that the detenu had made a request that he may be permitted to engage the services of a legal practitioner before the Advisory Board. The said request of the detenu was turned down without assigning any proper reasons. Mr. Kantawala submitted that before the Advisory Board the Sponsoring Authority was represented by three senior officers who assisted the Advisory Board on

facts and law with a view to justifying detention order. It was, therefore, incumbent upon the Advisory Board to allow the detenu's request to avoid any discrimination. He submitted that on this ground the order of detention must be set aside.

3. In support of his submissions, the learned counsel relied on the judgments of the Supreme Court in **Smt. Kavita v. The State of Maharashtra & Ors., AIR 1981 SC 1641**, **Nand Lal Bajaj v. State of Punjab & Anr., (1981) 4 SCC 327**, **A.K. Roy v. Union of India & Anr., AIR 1982 SC 710** and the judgment of this court in **Kekelwa Samuele Kongwa v. Union of India & Ors., 1985 Cr.L.J. 840** and unreported judgment of this court dated 30-6-06 in **Zubair Haji Qasim v. The State of Maharashtra & Ors., in Criminal Writ Petition No. 2312 of 2005**.

4. We have also heard Mr. Mhaispurkar, the learned APP at considerable length. He has taken us through the affidavits-in-reply of Mr. Madan Girju Sonde, Secretary to the Advisory Board, Mumbai and Mr. K. A. Shaikh, Assistant Director, Directorate of Revenue Intelligence, Mumbai. He has relied on the judgment of the Supreme Court in

A.K. Roy's case (supra) and another judgment of the Supreme Court in **Suresh Bhojraj Chelani v. The State of Maharashtra, 1983 (2) B C R 324**.

5. In our opinion, it is not necessary to refer to all the judgments on which reliance is placed by both sides in detail. The law in this behalf is well settled in **Smt. Kavita's case (supra)**. In this case the Supreme Court has held that though Section 8(e) of the COFEPOSA Act disentitles a detenu from claiming a right to be represented by a lawyer it does not disentitle him from making a request for the services of a lawyer and where a detenu makes a request for legal assistance, his request will have to be considered on merits of each individual case. The same principle is reiterated by the Supreme Court in **Nandlal Bajaj's case (supra)**. Obviously therefore, if request is made by the detenu for legal assistance before the Advisory Board it has to be considered by the Advisory Board. The request can be rejected after proper consideration thereof.

6. In **Zubair Haji Qasim's case (supra)** the Division Bench of this court had an occasion to consider similar question. In that case even

though the detenu in his representation addressed to the Advisory Board had specifically prayed that he be given opportunity to putforth his case through a legal practitioner, his request was not considered. The Division Bench in that case directed the learned APP to go through the papers of the Advisory Board. The learned APP on perusal of the file made a statement that the Advisory Board had rejected the prayer of the petitioner for being represented through a legal practitioner by observing that the prayer of the detenu for permitting to be represented through legal practitioner cannot be considered for "some obvious reasons". The Division Bench observed that what is meant by "obvious reasons" is not clear and consequently, it has to be held that the prayer of the detenu for permission to be represented by a legal practitioner was not rejected after proper consideration. It was further observed that it was rejected on erroneous grounds and, therefore, the order of detention is required to be set aside and quashed.

7. In the present case also, we had requested the learned APP Shri Mhaispurkar to go through the report of the Advisory Board. The learned APP

fairly stated that in this report also the Advisory Board has stated that the application of the detenu for permission to avail services of a lawyer has not been granted for "obvious reasons". In the light of the judgment of this court in **Zubair Kasim's case**, we must hold that in this case also the application of the detenu was rejected on erroneous grounds and, therefore, the continued detention of the detenu is illegal.

8. Besides in **Kelkelwa's case (supra)** after considering the same question Division Bench of this court has laid down 7 propositions. Proposition 19 (6) reads thus:

. "A request made by a detenu for being represented by a legal practitioner must be considered on merits and cannot be turned down on the ground (i) that the law does not give such a right to the detenu, or (ii) that it was the practice of the Advisory Board not to allow representation of a detenu by a legal practitioner."

9. In this case by letter dated 7/6/2006 the Secretary of the Advisory Board has informed the

advocate of the detenu that request for allowing representation of the case through an advocate was not considered because as per Section 8(e) of the COFEPOSA Act, he is not entitled to appear by legal practitioner in any matter connected with reference to the Advisory Board. In the affidavit filed by the Secretary it is stated that as a matter of practice the detenu is not permitted to be represented by a lawyer before the Advisory Board. In the teeth of the above conclusion in **Kekelwa's case (supra)** the Advisory Board could not have adopted this approach. In **Zubair Haji's case (supra)** also this court has taken a similar view after referring to paragraph 19 sub paragraph (6) of **Kekelwa's case**. We must, therefore, hold that the continued detention of the detenu is illegal on this ground also.

10. In the result the continued detention of the detenu Manoj Arjun Gore is rendered illegal and therefore, set aside. Detenu Manoj Arjun Gore is ordered to be released forthwith unless otherwise required in any other case.

JUDGE

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Mr. D. S. Mhaispurkar, APP

CORAM:-SMT. RANJANA DESAI &

ANOOP V. MOHTA, JJ.

DATED:-9/01/2007

OPERATIVE PART OF THE ORDER

. For the reasons separately recorded in the oral

judgment this court has ordered that the continued detention of the detenu is rendered illegal and therefore, set aside. Detenu Manoj Arjun Gore is ordered to be released forthwith unless otherwise required in any other case.

JUDGE

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